

Furthermore, to the extent that the Commission exempts existing contracts from the prohibitions of the Act, it frustrates congressional intent to eliminate promptly all unfair, deceptive and discriminatory practices in the cable television industry. Had Congress intended to "grandfather" some or all existing contracts providing for such practices, it could readily have done so. Indeed, Congress demonstrated that it knew how to draft a "grandfather" clause in subsection 628(h), which exempts exclusive contracts entered into on or before June 1, 1990.

At a minimum, if the Commission feels compelled to leave at least some existing contracts in effect, it should establish a deadline of two years within which satellite programming vendors must eliminate provisions in existing contracts that would violate the Commission's policies and restrictions under Section 628.

H. Procedural Issues

In paragraphs 38-49 of the NPRM, the Commission proposes procedures for enforcing the prohibitions of the Act. The Commission contemplates a formal complaint process under which persons allegedly aggrieved by prohibited practices would have their cases determined as expeditiously as possible. The complaint process would provide for a complaint and a response, but not a reply. Commission staff would participate in status conferences at an early date to encourage settlements, establish appropriate limitations on discovery and promote alternative dispute resolution ("ADR") approaches wherever possible. Com-

plainants would have to make a prima facie case of both discrimination and injury, and both complainants and respondents would be required to support each allegation and answer with affidavits and other tangible evidence. Motions to dismiss or for summary judgment would also be permitted, although they would have to be filed together with the response. Protective orders would also be available under appropriate circumstances.

In general, APPA supports the Commission's goal of expediting the complaint process and using ADR to the maximum extent possible. APPA also believes that limiting pleadings to a single complaint and a single response is feasible, so long as these documents are understood to be vehicles to define and narrow issues and not necessarily to resolve them where discovery, a hearing, a right to confront and cross-examine witnesses, and findings of fact and conclusions of law may be necessary. Furthermore, if the Commission establishes a process of the kind discussed in the preceding section to make relevant information readily available to purchasers, APPA would also endorse the Commission's suggestion that parties be required support each allegation in detail, with affidavits or other tangible evidence.

APPA does, however, disagree with the manner in which the Commission's proposed procedures would allocate burdens of proof among claimants and respondents. As discussed above, APPA does not believe that a complainant can or should be required to prove harm once he has established that the respondent has

engaged in prohibited conduct. APPA submits that the Commission's procedural rules must be modified to reflect this.

Furthermore, if the Commission contemplates that its staff will rely heavily upon the parties' initial filings, then it may well be unfair and unreasonable to deny a complainant the opportunity to file a reply to the respondent's answer, which is likely to be the first document in which the respondent attempts to justify discriminatory prices, terms and conditions or allege public-interest grounds for exclusive contracts. A written reply in these circumstances would enhance, rather than inhibit, the staff's ability to frame the issues.

Similarly, requiring the complainant to support his allegations with detailed evidence is feasible only if the Commission establishes an effective mechanism outside the complaint process through which purchasers can gather relevant information about their vendors' practices. If no such mechanism exists, elementary considerations of due process dictate that complainants be afforded a full and fair opportunity to engage in discovery before the Commission.

Finally, in paragraph 42 of the NPRM, the Commission asks for comment on whether it is possible to have a single standard for a prima facie case. APPA believes that the standard for a prima facie case will necessarily depend upon the substantive legal standards that a claimant must meet to prevail, as defined by the Act and the Commission's implementing rules. For example, to make out a prima facie case, a complainant alleging

an unlawful exclusive contract under subsection 628(c)(2)(D) would simply have to show that (1) a satellite programming vendor (2) in which a cable operator has an attributable interest (3) has used an exclusive contract (4) to deny the complainant access to programming (5) in an area served by a cable operator on the effective date of the Act. The respondent would then have to prove that the contract was in the public interest in view of the five factors listed in subsection 628(c)(4). By contrast, a complainant alleging a discriminatory price would have a more complex burden to establish a prima facie case, as he would not only have to present (1) the allegedly discriminatory price that he is being asked to pay (2) by a satellite programming vendor (3) in which a cable operator has an attributable interest, but also (4) the facts pertaining to the vendor's sales to others that, under the standards spelled out in the Act or the Commission's regulations, would render the price paid by the complainant discriminatory as a matter of law.

IV. APPA REPRESENTATIVES

All communications and correspondence regarding this matter should be directed to the following representatives of APPA:

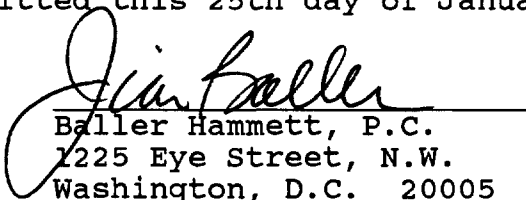
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V. CONCLUSION

The Commission, APPA submits, has made an excellent start on a surpassingly difficult assignment. APPA hopes that the suggestions it has made above will help the Commission give full effect to Congress's overriding goal of fostering competition in the cable television industry.

Respectfully submitted this 25th day of January, 1993.


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ATTACHMENT
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**GLASGOW, KENTUCKY
CABLE CUSTOMER SURVEY**

JUNE 13, 1991

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To conduct the door-to-door survey, a sampling frame was obtained from the active customer list of the Electric Plant Board. From the total number of customers, it was determined that 534 attempted surveys would be needed to maintain an error rate below five percent. To obtain the optimum confidence level and error rate, 644 attempted were completed. Since the focus of the survey was on Phase One, more survey attempts were needed in that area to obtain a five percent error rating for that phase.

The sample was derived from a method utilizing a random selection with random start. To calculate the number of attempts needed for each phase, the total number of listings by phase were entered into the SPSS/PC+, a statistics software program available through Academic Computing and Research Services at Western Kentucky University. The number generated, obtained for optimal confidence level and error rating, was then divided into the number of total listing for that particular phase. The number calculated from that procedure generated the "n"th listing that would be used in the survey. With each phase listing, the first sample was determined with a random start generated from a random number table. If a sufficient sample had not been obtained by the end of the phase listing a "wrap-around" method was used until a sufficient sample was drawn. The total number of surveys attempted includes those residents who refused to be interviewed, nonresponses due to improper address, sample that included business locations, and listings of undeveloped property.

SAMPLE SIZE AND ERROR RATES

(95% Confidence Interval)

	Total Population	Final Sample Size	Error Rate (=/-%)
Phase 1	456	179	5.71%
Phase 1A	269	17	23.01%
Phase 2	594	44	14.22%
Phase 2A	712	52	13.00%
Phase 3	258	18	22.28%
Phase 4	813	38	15.52%
Phase 4A	588	34	16.31%
Phase 5	108	3	55.79%
Phase 6	678	55	12.67%
Phase 7	437	28	17.92%
Phase 8	110	7	35.50%
Total	5023	475	4.28%

When the total size of a population is known, optimum sample size can be calculated. Information about the total population may then be inferred from the sample. A 95% confidence interval means that if an infinite number of samples were drawn from the population, 95% of them would accurately reflect the population. Calculation of the error rate allows estimation of the margin of error in calculations using the sample.

For this study, the confidence interval is 95% with error rates of 5.71% for the portion of the sample drawn from Phase 1 and 4.28% for the whole sample.

READING A FREQUENCY DISTRIBUTION

A frequency distribution provides a report of the answers provided by respondents. Since percentages are generally easier to comprehend than simple numbers, percentages are calculated for each reported answer. The number of missing cases is also reported. A missing case indicates that the respondent either would not or could not answer the question. To make understanding the frequency distribution easier, three percentages are reported: "Percent" reports the percentage of all cases (both answers and missing); "Valid percent" reports the percentage of all valid cases (non-missing); and "Cum Percent" reports a running cumulative total percentage for all valid cases.

The table below indicates that 91.2% of the people contacted were cable subscribers or had subscribed in the past. Using the confidence interval and error rate, we can be 95% confident that between 86.9% and 95.5% ($91.2\% \pm 4.28\%$) of the people in Glasgow are or have been cable subscribers.

Are you a cable TV subscriber now or have you subscribed in the past?

	Frequency	Percent	Valid Percent	Cum Percent
Yes	426	91.2	92.4	92.4
No	35	7.5	7.6	100.0
	6	1.3	MISSING	
	-----	-----	-----	
TOTAL	467	100.0	100.0	
Valid Cases	461	Missing Cases	6	

All cable subscribers

1. How long have you lived in Glasgow?

	Frequency	Percent	Valid Percent	Cum Percent
5 years or less	63	14.8	15.0	15.0
6 to 10 years	45	10.6	10.7	25.7
11 to 15 years	52	12.2	12.4	38.1
16 to 20 years	43	10.1	10.2	48.3
21 years or more	217	50.9	51.7	100.0
	6	1.4	MISSING	
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TOTAL	426	100.0	100.0	
Valid Cases	420	Missing Cases	6	

3. What is most important to you when you select a cable TV service?

(Multiple responses allowed)

	COUNT	PCT OF RESPONSES	PCT OF CASES
Price	159	29.9	37.6
Availability of channels	140	26.3	33.1
Quality of the picture	124	23.3	29.3
Responsiveness of service personnel	56	10.5	13.2
Other	53	10.0	12.5
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	532	100.0	125.8

3 Missing cases 423 Valid cases

Most often reported OTHER:

	COUNT	PCT OF RESPONSES	PCT OF CASES
Telescripps was the only service available	26	4.89	6.15

All cable subscribers

8. In your experience, has the competition created by the Electric Plant Board entering the market improved cable TV service in Glasgow?

	Frequency	Percent	Valid Percent	Cum Percent
Yes	273	64.1	64.7	64.7
No	48	11.3	11.4	76.1
Don't Know	101	23.7	23.9	100.0
	4	.9	MISSING	
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TOTAL	426	100.0	100.0	
Valid Cases	422	Missing Cases	4	

A significant percentage of the respondents felt that competition created by the Electric Plant Board entering the market has improved cable services for all citizens of Glasgow.

9. How would you evaluate Telescripps cable TV service BEFORE the Electric Plant Board introduced their cable TV service?

	Frequency	Percent	Valid Percent	Cum Percent
Excellent	16	3.8	3.8	3.8
Good	186	43.7	44.5	48.3
Fair	101	23.7	24.2	72.5
Poor	73	17.1	17.5	90.0
Don't Know	42	9.9	10.0	100.0
	8	1.9	MISSING	
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TOTAL	426	100.0	100.0	
Valid Cases	418	Missing Cases	8	

Telescripps did not enjoy an outstanding reputation for their services when they were the only cable provider in Glasgow.

All cable subscribers

27. Do you favor having two cable services in Glasgow?

	Frequency	Percent	Valid Percent	Cum Percent
Yes	346	81.2	81.8	81.8
No	29	6.8	6.9	88.7
Don't Know	48	11.3	11.3	100.0
	3	.7	MISSING	
	-----	-----	-----	
TOTAL	426	100.0	100.0	
Valid Cases	423	Missing Cases	3	

An overwhelming percentage of respondents reported that they favor having two cable services in Glasgow. This is most likely because most consumers tended to feel that the competition would keep each cable service "on its toes".

Telescripps customers only

3. What is most important to you when you select a cable TV service?

(Multiple responses allowed)

	COUNT	PCT OF RESPONSES	PCT OF CASES
Price	118	34.7	41.8
Availability of channels	92	27.1	32.6
Quality of the picture	68	20.0	24.1
Responsiveness of service personnel	22	6.5	7.8
Other	40	11.8	14.2
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	340	100.0	120.6

2 Missing cases

282 Valid cases

It is interesting that price is a more significant factor to Telescripps customers than to Electric Plant Board customers.

5. When the Electric Plant Board introduced cable TV service, how did you first learn about this service?

	COUNT	PCT OF RESPONSES	PCT OF CASES
Newspaper	141	48.6	50.9
Information in electric bill	16	5.5	5.8
Radio	37	12.8	13.4
Visit from an EPB representative	6	2.1	2.2
Do not know about EPB cable service	1	0.3	0.4
Other	89	30.7	32.1
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	290	100.0	104.7

7 Missing cases

277 Valid cases

ANSWERS TO QUESTIONS RE SURVEY
6/13/1991

- * Of the respondents who said price was an important factor
- * in their selection of a cable TV service, which service do
- * they subscribe to?.

	Frequency	Percent	Valid Percent	Cum Percent
Telescripps	118	74.2	75.2	75.2
Electric Plant Board	37	23.3	23.6	98.7
Not a subscriber	2	1.3	1.3	100.0
	2	1.2	Missing	

Total	159	100.0	100.0	
Valid cases	157	Missing cases	2	

- * Of the respondents who said channel selection was an important
- * factor in their selection of a cable TV service, which service
- * do they subscribe to?.

	Frequency	Percent	Valid Percent	Cum Percent
Telescripps	92	65.7	66.7	66.7
Electric Plant Board	44	31.4	31.9	98.6
Not a subscriber	2	1.4	1.4	100.0
	2	1.4	Missing	

Total	140	100.0	100.0	
Valid cases	138	Missing cases	2	

- * Of those subscribers who reported visits from Telescripps
- * what percentage are still Telescripps customers?.

	Frequency	Percent	Valid Percent	Cum Percent
Telescripps	42	57.5	60.0	60.0
Electric Plant Board	28	38.4	40.0	100.0
	3	4.1	Missing	

Total	73	100.0	100.0	
Valid cases	70	Missing cases	3	